U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19003121

Date: AUG. 25, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner, a provider of healthcare staffing, seeks to employ the Beneficiary as administrator. The company requests his classification under the second-preference, immigrant visa category for members of the professions holding advanced degrees or their equivalents. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

The Director of the Nebraska Service Center denied the petition and dismissed the Petitioner's following motion to reconsider. The Director concluded that the company did not demonstrate the Beneficiary's qualifications for the offered position.

The Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon *de novo* review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.[1]

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (DOL) for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) the employment of a noncitizen in the position would not harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, an employer must submit an approved labor certification with an immigrant visa petition to USCIS. *See* section 204 of the Act. Among other things, USCIS determines whether a noncitizen

[1] An attorney submitted a Form G-28, Entry of Appearance, on behalf of the Beneficiary. The Beneficiary, however, is not an "affected party" who is eligible for representation in this matter. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B) (defining the term "affected party" as excluding beneficiaries). U.S. Citizenship and Immigration Services (USCIS) treats beneficiaries as affected parties only if: their petitions are in revocation proceedings; they qualify to "port" to new jobs under section 204(j) of the Act, 8 U.S.C. § 1154(j); and they properly requested to do so. *Matter of V-S-G- Inc.*, Adopted Decision 2017-06, slip op. at *14 (AAO Nov. 11, 2017).

beneficiary meets the requirements of a certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(k).

Finally, if USCIS approves a petition, a noncitizen may apply for an immigrant visa abroad or, if eligible, "adjustment of status" in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. THE JOB REQUIREMENTS

A petitioner must demonstrate a beneficiary's possession of all DOL-certified, job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). This petition's priority date is December 31, 2015, the date DOL accepted the accompanying application for labor certification. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

When assessing a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. USCIS may neither ignore a certification term nor impose unlisted requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

The accompanying labor certification states the minimum educational requirements of the offered position of administrator as a U.S. bachelor's degree, or a foreign equivalent degree, in science, an "equivalent" field, or "natural health science." The certification also indicates that the position requires five years of progressive, post-baccalaureate experience in the offered position, as a "rehab director," or in an "equivalent" occupation.

On the labor certification, the Beneficiary attested that, by the petition's December 2015 priority date, an Indian college awarded him a bachelor's degree in natural health science. He also stated that, by his September 2015 start date of employment with the Petitioner, he gained more than 10 years of full-time, qualifying experience with rehabilitation companies in the United States.[2] The Beneficiary listed the following, prior employment:

- About two years, eight months as a healthcare administrator for [redacted], from February 2013 to September 2015;
- About five years, one month as a rehab director for [redacted] from January 2008 through January 2013;
- About one year, eight months as a rehab director for [redacted] from April 2006 through December 2007; and
- About ten months as a rehab director for [redacted] from June 2005 to April 2006.

[2] Employers can't rely on experience that beneficiaries gained with them, unless the noncitizens acquired the experience in positions substantially different than the offered ones or the employers can demonstrate the impracticality of training U.S. workers for the positions. 20 C.F.R. § 656.17(i)(3). The Petitioner doesn't assert that the Beneficiary gained qualifying experience with it.

A. The Required Experience

To support claimed, qualifying experience, a petitioner must submit letters from a beneficiary's former employers. 8 C.F.R. § 204.5(g)(1). The letters must include the employers' names, titles, and addresses, and descriptions of the beneficiary's experience. *Id.* The Petitioner submitted letters from all four of the Beneficiary's purported former employers, as well as copies of supporting payroll and tax records.

The Director, however, found the evidence to be inconsistent. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies). The Director noted that, consistent with the Beneficiary's attestation on the labor certification, the letter from [redacted] states the company's full-time employment of him from February 2013 to September 2015. But, with an application for adjustment of status, the Beneficiary submitted a prior [redacted] letter stating his October 2012 start date with the company. The Director also noted that [redacted]'s most recent letter states the Beneficiary's annual salary throughout his company tenure as $90,000. Copies of the Beneficiary's IRS Forms W-2, Wage and Tax Statements, indicate that the company paid him $99,230.60 in 2014, $67,102.71 in 2015, but only $46,919 in 2013.

The payroll and tax records do not include [redacted] documents for 2012. A preponderance of evidence therefore indicates that [redacted] did not begin employing the Beneficiary until 2013. The pay amount on the 2013 Form W-2 ($46,919) suggests that the Beneficiary did not work full-time for [redacted] that year in the $90,000-a-year position of health care administrator. The pay amount on the 2015 W-2 ($67,102.71) supports the company's full-time employment of the Beneficiary as administrator until September that year. But his individual federal tax return for 2015 states total wages of only $48,064.[3] The inconsistent wage amounts on the Beneficiary's Form W-2 and tax return cast doubt that he worked nine months for [redacted] in 2015 on a full-time basis. For immigration purposes, part-time experience equals less than full-time experience. Valuation of part-time experience involves consideration of weekly hours worked and the duration of the employment. *See Matter of 1 Grand Express*, 2014-PER-00783 (BALCA Jan. 16, 2018) (equating 29.5 months of part-time experience to about 18.5 months of full-time experience based on multiplication of the employment's duration (29.5 months) by 0.625, representing 25/40 weekly hours). Thus, without additional explanation or evidence of the Beneficiary's weekly hours and duration of employment in 2013 and 2015, the Petitioner has not demonstrated his acquisition of more than one year (2014) of full-time, qualifying experience with [redacted]

The letter from [redacted] for whom the Beneficiary purportedly worked from January 2008 to January 2013, states the company's employment of him only until September 2012. Payroll and tax records, however, constitute independent, objective evidence of the Beneficiary's dates of employment and document his work for [redacted] until January 2013. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring petitioners to resolve inconsistencies with independent, objective evidence). The information on these records also agrees with the information on the Beneficiary's individual

[3] The record shows the Beneficiary's filing of a joint tax return in 2015 with his spouse. The tax return does not include copies of Forms W-2 for the Beneficiary or his spouse.

federal income tax returns for the relevant years. A preponderance of evidence therefore demonstrates the Beneficiary's work for [redacted] from January 2008 to January 2013.

During that period, however, online government records indicate that the Beneficiary did not work in the claimed, qualifying position of rehab director. [redacted]'s annual, corporate report for 2007 lists the Beneficiary as the corporation's sole officer, indicating his role as president, secretary, treasurer, and director. Mich. Dep't of Licensing & Regulatory Affairs (LARA), Corps. Online Filing Sys., "Search for a business entity," https://cofs.lara.state.mi.us/SearchApi/Search/Search (last visited Aug. 23, 2021). Also, [redacted]'s November 2008 application for a "certificate of assumed name" bears a signature in the Beneficiary's name and identifies him as the company's president. *Id.*

[redacted] filed a Form I-140 petition for the Beneficiary, which USCIS approved then revoked. In revocation proceedings, [redacted] claimed that the Beneficiary worked for it only as rehab director. The company's owner stated that the 2007 annual report listing the Beneficiary as the company's sole officer "was an error." But [redacted] did not explain how the purported error occurred. The company also did not explain the Beneficiary's signature, name, and presidential title on [redacted]'s 2008 application for an assumed name. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record). We recently issued a remand in the [redacted] revocation proceedings. *See In Re: 17624197* (AAO Aug. 10, 2021). Thus, the nature of the Beneficiary's employment with [redacted] remains unresolved.

In addition, in federal court proceedings initiated by the U.S. government, the Beneficiary provided an affidavit attesting that [redacted] was either owned by or affiliated with his brother-in-law. [redacted]). USCIS records also confirm the family relationship and, in the petition revocation proceedings, [redacted] admitted it. The family relationship and the brother-in-law's potential influence on [redacted]s management cast doubt on the objectivity and reliability of the company's employment letter for the Beneficiary. For this additional reason, the record does not establish the Beneficiary's claimed work in the qualifying position of rehab director for the five-year period from January 2008 to January 2013.

The letters from the Beneficiary's two other purported former employers - [redacted] and [redacted] - together indicate that the Beneficiary gained qualifying experience of about two and a half years, from June 2005 to December 2007. Thus, even combined with one year of qualifying experience with [redacted], the letters would not demonstrate the Beneficiary's possession of the requisite five years of qualifying experience.

Also, evidence identifies the Beneficiary's same brother-in-law as a principal of both [redacted] and [redacted] Copies of annual corporate registrations list the brother-in-law as [redacted]s chief executive officer (CEO) and chief financial officer in 2005 and its sole officer from 2008 through 2012. Ga. Corps. Div., "Business Search," https://ecorp.sos.ga.gov/BusinessSearch (last visited Aug. 23, 2021).[4] The April 2006 letter from [redacted] bears the brother-in-law's signature and identifies him as the company's president. An August 2001

[4] State, online records indicate that [redacted] didn't file an annual registration in 2007. The company's 2005 registration was unavailable online. *Id.*

application for "certificate of assumed name" and a March 2004 "certificate of termination of assumed name" also bear the brother-in-law's signature and identify him, respectively, as [redacted]'s CEO and administrator. Mich. Dep't of Licensing & Regulatory Affairs, Corps. Online Filing Sys., "Search for a business entity," https://cofs.lara.state.mi.us/SearchApi/Search/Search (last visited Aug. 23, 2021); *see also United States v. Rathod*, Nos. 19-1385/1453, slip op. at *1 (6th Cir. Sep. 10, 2020) (identifying the Beneficiary's brother-in-law as a principal of [redacted]).

The Petitioner submitted copies of payroll and tax records supporting the Beneficiary's claimed dates of employment with [redacted] and [redacted] But these records do not corroborate his claimed positions and job duties with the companies. Because of the Beneficiary's family relationship with his brother-in-law, the record doesn't reliably establish the claimed, qualifying nature of the Beneficiary's positions from June 2005 to December 2007.

The Petitioner further submitted letters and copies of payroll and tax records from two purported former employers of the Beneficiary in India who were omitted from the labor certification. The Director concluded that the Beneficiary's purported tenures with these hospitals - totaling about four years and 10 months, from January 1998 to November 2002 - conflict with his claimed, full-time college studies from 1996 to 2003. But we discount the claimed, foreign experience for a more fundamental reason: a copy of the Beneficiary's college diploma shows that he gained the purported, qualifying experience before receiving his bachelor's degree in March 2003. Thus, the employment wouldn't constitute post-baccalaureate experience as the offered position and requested immigrant visa category require. *See* 8 C.F.R. § 204.5(k)(2) (identifying the equivalent of an advanced degree as a bachelor's degree "followed by" at least five years of progressive experience in the specialty).[5] Also, the Petitioner has not explained the omission of the purported foreign qualifying experience from the labor certification application. *See Matter of Leung*, 16 I&N Dec. 12, 14-15 (Distr. Dir. 1976), *disapp'd of on unrelated grounds by Matter of Lam*, 16 I&N Dec. 432, 434 (BIA 1978) (discounting an adjustment applicant's testimony of qualifying experience where he did not attest to the employment on his labor certification application).

The Director didn't inform the Petitioner of the Beneficiary's apparent family relationship with a principal of three of his purported former employers or the inconsistent evidence regarding the nature of his claimed position with [redacted] *See* 8 C.F.R. § 103.2(b)(16)(i) (requiring USCIS, before issuing an adverse decision, to notify a petitioner of derogatory information of which the business is unaware). We will therefore withdraw the Director's decision and remand the matter.

On remand, the Director should notify the Petitioner of the derogatory information and evidentiary inconsistencies undermining the Beneficiary's claimed, qualifying experience. The Director should

[5] A beneficiary may gain qualifying, post-baccalaureate experience before a degree's issuance if a record contains a copy of a provisional certificate from a college or university demonstrating the noncitizen's completion of all substantive, degree requirements and the school's approval of the degree. *Matter of O-A-, Inc.*, Adopted Decision 2017-03, slip op. at *4 (AAO Apr. 17, 2017). The Petitioner submitted a copy of a provisional certificate that the Beneficiary's college issued to him in June 2001. The certificate states the Beneficiary's passage of an examination after his final year of study. But, contrary to *O-A-*'s requirements, the certificate does not demonstrate his completion of all substantive degree requirements or the school's approval of the degree. Also, a copy of the Beneficiary's "college record" states that, after three years of study, his baccalaureate program in natural health science required successful completion of a one-year internship.

also afford the company a reasonable opportunity to explain the discrepancies and submit additional evidence.

B. The Required Educational Credentials

The Director also questioned the authenticity of the Beneficiary's educational documents. The Director found that a signature in the Beneficiary's name on a copy of his April 2002, college "statement of marks" does not match the signatures in his name on the labor certification, his purported driver's license, or his purported passport.[6]

On appeal, the Petitioner asserts that the Director's decision doesn't sufficiently describe the alleged discrepancies in the signatures or explain how the purported inconsistencies cast doubt on the Beneficiary's claimed, educational qualifications. The Petitioner states that USCIS "failed to offer the rational connection between facts and judgment required."

The Petitioner also submits a written opinion from a forensic handwriting expert. We do not generally consider evidence on appeal if, in the proceedings below, a petitioner received notice of the required evidence and an opportunity to submit it. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). The record, however, shows that, before issuing her decision, the Director didn't inform the Petitioner of her doubts about the Beneficiary's educational documents. We will therefore accept the expert opinion on appeal as evidence. The opinion concludes that the same person signed the Beneficiary's name on the college marks statement, the labor certification, and the driver's license.[7]

USCIS must "explain in writing the specific reasons for denial." 8 C.F.R. § 103.3(a)(1)(i). The Director's decision does not establish that she based the petition's denial on the Beneficiary's educational qualifications. The decision states that the Beneficiary's educational documents are "in question" and ultimately concludes that "the evidence does not establish that the beneficiary met the minimum requirements for the position." But the decision finds the alleged conflict between the dates of the Beneficiary's claimed employment in India and his university education indicative only of the likelihood that he did not work for the claimed foreign employers. The decision does not specify that the record lacks sufficient evidence of the Beneficiary's claimed educational credentials.

On remand, the Director should review the expert opinion and prior evidence regarding the Beneficiary's educational documents. If the Director finds the record insufficient to demonstrate the Beneficiary's educational qualifications for the offered position, her new decision must state so and explain the specific reasons for the denial on that ground.

III. ABILITY TO PAY THE PROFFERED WAGE

Although unaddressed by the Director, the record also doesn't establish the Petitioner's required ability to pay the proffered wage of the offered position.

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[6] The record contains copies of signatures in the Beneficiary's name on two passports: one issued in January 2010; and the other in September 2002. The decision doesn't specify which passport signature the Director questions.

[7] The opinion does not consider the signature in the Beneficiary's name in either of the passports.

A petitioner must demonstrate its continuing ability to pay a position's proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

The petition included a copy of the Petitioner's federal income tax return for 2015. The record, however, lacks regulatory required evidence of the Petitioner's ability to pay the proffered wage in the following years. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate its ability to pay a proffered wage from a petition's priority date "and continuing until the beneficiary obtains lawful permanent residence").

Thus, on remand, the Director should also ask the Petitioner to submit copies of its annual reports, federal tax returns, or audited financial statements for 2016 through 2020. The company may submit additional evidence of its ability to pay, including proof of wages it paid the Beneficiary in relevant years or materials supporting the factors stated in *Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

If supported by the record, the Director may inform the Petitioner of any additional, potential grounds of denial. The Director, however, must provide the company with a reasonable opportunity to respond to all issues raised on remand. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

IV. CONCLUSION

Based on derogatory information and evidentiary inconsistencies previously undisclosed to the Petitioner, the record does not establish the Beneficiary's qualifying experience for the offered position. The company also did not demonstrate its continuing ability to pay the position's proffered wage.

ORDER: The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.